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June 14, 2011

In re Merck & Co., Inc., Securities, Derivative & "ERISA" Litigation (MDL 1658)  
Nos. 05-CV-01151-SRC-MAS & 05-CV-02367-SRC-MAS  
The Consolidated Securities Action

Dear Judge Chesler:

We respectfully submit this letter on behalf of all Defendants<sup>1</sup> in response to Plaintiffs' letter, dated June 9, 2011, regarding the Supreme Court's recent decision in *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403, 2011 WL 2175208, \_\_\_ U.S. \_\_\_ (June 6, 2011). Like the cases Plaintiffs have previously brought to this Court's attention, *Halliburton* does not undermine, or even affect, the legal bases for Defendants' pending motion to dismiss.

In *Halliburton*, the Supreme Court held that the Fifth Circuit had erroneously required securities plaintiffs to prove loss causation *at the class certification stage* before invoking the fraud-on-the-market presumption of reliance.<sup>2</sup> *Halliburton*, 2011 WL 2175208, at \*8. This holding is irrelevant to Defendants' pending motion to dismiss because this action is *not* at the class certification stage.

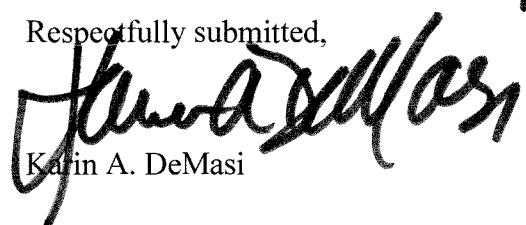
<sup>1</sup> Defendant Dr. Edward M. Scolnick, who is separately represented and filed his own motion to dismiss, joins in this letter.

<sup>2</sup> Even prior to the *Halliburton* decision, the Third Circuit had expressly declined to follow the Fifth Circuit's holding, as Defendants observed in our April 4, 2011 letter to the Court. *See In re DVI, Inc. Sec. Litig.*, No. 08-8033, 08-8045, 2011 WL 1125926, at \*7-8 (3d Cir. Mar. 29, 2011); *see also* letter from K. DeMasi to the Court, dated Apr. 4, 2011 (ECF No. 273). The Third Circuit's *DVI* decision had not yet been issued when Defendants filed their motion to dismiss, but in any event did not affect Defendants' loss causation arguments for all the reasons set forth in Defendants' April 4 letter.

The failure to adequately plead loss causation remains a proper basis for dismissing a complaint brought under Section 10(b). *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) (dismissing a complaint on loss causation grounds when plaintiffs failed to plead a specific “causal connection between the material misrepresentation and the loss”) (Mem. 25-26).<sup>3</sup> The Court’s decision in *Halliburton* does not affect the pleading standard articulated in *Dura*. Indeed, Plaintiffs’ own letter concedes that they must “provide a defendant with *some* indication of the loss and the causal connection that the [plaintiff has] in mind” at this stage of the proceeding (Plaintiffs’ June 9, 2011 letter, quoting *Dura*, 544 U.S. at 347); here, Plaintiffs have failed to provide *any* indication that their losses were caused by Defendants’ allegedly false beliefs in the naproxen hypothesis.

As Defendants explained in our April 4, 2011 letter to the Court, the Complaint should be dismissed because Plaintiffs have failed to plead any plausible allegations that their losses were caused by the revelation that Defendants did not “actually believe” the naproxen hypothesis. For example, Plaintiffs do not—and cannot—allege that the losses incurred in October 2003 and September 2004 were caused by the purported revelation of Defendants’ falsely held beliefs because *there were no such revelations corresponding to those dates*. (See Mem. 25-29; Reply 8-16.) Nor do Plaintiffs adequately plead loss causation with respect to the alleged losses on November 1, 2004, because no investor could reasonably have believed that Vioxx retained *any* meaningful commercial viability after it was withdrawn from the market on September 30, 2004. (See Mem. 29-30; Reply 16-19.) Accordingly, Plaintiffs’ claims should be dismissed for failure to adequately plead loss causation.

Respectfully submitted,



Karen A. DeMasi

Honorable Stanley R. Chesler, U.S.D.J.  
 United States District Court for the District of New Jersey  
 Martin Luther King, Jr. Federal Building & U.S. Courthouse  
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VIA ECF

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<sup>3</sup> Citations to “Mem.” and “Reply” refer to the Memorandum of Law in Support of Defendants’ Motion To Dismiss the Corrected Consolidated Fifth Amended Class Action Complaint (ECF No. 254 Attach. 1) and the Reply Memorandum of Law in Support of Defendants’ Motion To Dismiss the Corrected Consolidated Fifth Amended Class Action Complaint (ECF No. 264), respectively.

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